Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: September 28, 1998
CASE NO: 97-INA-474

In the Matter of:

ROBERT AND YUKIKO SANFORD
Employer

On Behalf of:

MOTOKO TANAKA
Alien

Appearance: Robert Z. Berger, Esq.
San Francisco, CA,
For the Employer and Alien

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. §1182 (a) (5) (1990) ("Act"). The certification of aliens for permanent employment is governed by §212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the

place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

Statement of the Case

On April 1, 1995, Robert and Yukiko Sanford ("employer") filed an application for labor certification to enable Motoko Tanaka ("alien") to fill the position of Tutor at a hourly wage of $10.00 (AF 76). The job duties are described as follows:

> Teach academic subjects in a home setting to 3 minor children, including 1 kindergarten age boy and 2 pre-school age girls. Teach Japanese language and culture as well as basic math, reading, and writing skills. Develop and adapt curriculum to each child's needs. Tutor is not responsible for children's recreation, diet, meals, outing or child care.

The job requirements are two years of experience in the job offered or two years of college training in the field of Education. The employer also specified that applicants must have fluency in Japanese and knowledge of Japanese culture (AF 76).

On July 8, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the employer violated §656.21(b)(2)(I)(A)(B) which provides that the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States; and be defined in the *Dictionary of Occupational Titles* (*DOT*).

In the NOF, the CO noted that although the employer classified the position as a tutor, the job duties more closely resembled the duties of a children's tutor because they involve cultural instruction, which is distinguished from academic subjects. According to the *DOT*, the Specific Vocational Preparation (SVP) for the position of children's tutor is over six months up to and including one year which exceeds the employer's requirements of two years of experience in the job offered or two years of college in the field of Education. The CO therefore requested the employer to delete or alter the requirements and readvertise, or demonstrate that the requirement is customary or normal for the position in the United States (AF 71). The CO also disputed the employer's compliance with §656.3 which defines employment as full-time, permanent work by an employee for an employer other than oneself. The CO determined that the stated tutoring job

[1] All further references to documents contained in the Appeal File will be noted as "AF."

duties did not constitute a full-time, 40-hour per week job.

In rebuttal, dated August 9, 1996, the employer argued that the DOT clearly supports the position that the job duties are for a tutor, not children's tutor. In support of this argument, the employer emphasized that the DOT definition of tutor involves teaching academic subjects such as English, math, and foreign languages in the children's home. The employer pointed out that the stated job duties are similar to those of a tutor, noting that the tutor will teach academic subjects in addition to Japanese language and culture in their home. The employer further reported that either Mr. or Mrs. Sanford will be home at all times to provide the children with meals, recreation, and any other child care duties. With regard to full-time employment, the employer argued that the position is clearly 40-hours per week as the incumbent will work from 12:00 p.m. to 7:00 p.m., Monday through Friday, and 9:00 a.m. to 2:00 p.m. on Saturday. The duties will include planning the curriculum, updating the parents on the children's progress, and discussions on how to best monitor development (AF 53).

The CO issued the Final Determination on August 21, 1996, denying labor certification. The CO determined that the employer inflated the actual academic duties by including duties normally associated with the occupation of tutor. The CO concluded that "given the fact that the children are very young, and the duties include teaching Japanese language, culture and heritage, the job is closer to that of children's tutor" (AF 47). As such, the CO concluded the two years minimum requirement remained unduly restrictive. The CO also found that the employer's argument relating to full-time employment was unpersuasive. Specifically, the CO determined that the employer's allocation of five hours a week to developing lesson plans and discussing the children's progress with their parents was excessive.

On September 25, 1996, the employer requested review of Denial of Labor Certification pursuant to §656.26(b)(1) (AF 1).

Discussion

The issues presented by this appeal are whether the requirement that applicants possess two years of experience in the job offered or two years of college training in Education is unduly restrictive under §656.21(b)(2), and whether the employer documented that the position was permanent, full-time employment §656.3.

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of §656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the *DOT* and are normally required for a job in the United States. *Ivy Cheng*, 93-INA-106 (June 28, 1994); *Lebanese Arak Corp.*, 87-

INA-683 (Apr. 24, 1989) (*en banc*).

In this case, the employer required that applicants possess two years of experience in the job offered or two years of college training in Education, along with fluency in the Japanese language (AF 76). The CO concluded that the position was more appropriately defined as children's tutor -- rather than tutor -- because it primarily involved teaching two pre-school age and one kindergarten age children the Japanese language. In reaching this conclusion, the CO pointed out that one of the essential duties for a children's tutor is teaching foreign languages. *See DOT, No. 099.227-010*. The CO therefore determined that the requirement that applicants possess two years of experience was unduly restrictive because it exceeds the SVP [2] for children's tutor which is designated as "over six months up to and including one year." Given the young ages of the children, and the fact that teaching Japanese is a primary duty for the position,[3] we find that the job duties more accurately reflect those of a children's tutor. Since the employer failed to comply with §656.21(b)(2), certification cannot be granted and further examination of the other reasons cited by the CO is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final

[2] Specific Vocation Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. *See DOT, Appendix C.*

[3] This is evidenced by the fact that fluency in Japanese is required of all applicants, as well as the stated job duties.

decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and,**(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.